IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA, *Petitioner,*

vs.

HIRAM W. EVANS, ET AL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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INTRODUCTORY

The United States District Court for the Northern District of Georgia entered judgment dismissing the complaints of the State of Georgia herein, for failure to state a claim upon which relief can be granted.

The Circuit Court of Appeals for the Fifth Circuit affirmed. *123 Fed. (2d) 57.*

The State of Georgia filed its petition for writ of certiorari.

ISSUE

The sole issue presented is one of law, that is, whether the State of Georgia possesses under the Sherman Act the right of suit for treble damages.

ARGUMENT

The question raised by the petition in this case is one that was settled by this Court in *U. S. vs. Cooper Corporation, 312 U. S. 600.* It seems unnecessary to burden the docket of this Court with another such case. For the convenience of the Court the respondents are filing a joint brief.

In *U. S. vs. Cooper Corp., 312 U. S. 600,* this Court held that the right to treble damages conferred by the Anti-Trust Acts was given to natural and artificial persons, that is, individuals and corporations, and that the United States is not such a person or corporation.

It is equally apparent that the State of Georgia is not such a natural or artificial person.

That the Anti-Trust Acts create new rights and new remedies, and that those rights and remedies are conferred only upon the class embraced within the word "person" as used in the Acts, was not established first by *United States vs. Cooper Corporation.* This Court had settled that rule in *Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165; Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27; Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590.*

These Acts were designed to prevent monopolistic practices and to impose regulatory prohibitions upon "any person" guilty of monopolistic practices. The Acts regulate what may be done or not done by those persons subject to its provisions. They give to those persons rights to protect themselves against the prohibited monopolistic practices. The rights conferred, and the regulations imposed, fall upon the same class. The word "person" has only one meaning in the statutes. The word is defined in the Act, and that definition gives only one meaning to the word.

The brief for the petitioner carefully restricts the claim that the State of Georgia as a "person" under the Anti-Trust Acts to that of a recipient of rights, and excludes the State of Georgia as a "person" from any obligation under the Acts. The word "person" is given two meanings under the Acts. When the word is used to grant a right of suit, it is said that the State is a "person," but care is taken never to admit that the State is a "person" that is subject to the regulatory provision of the Acts or that may be sued for treble damages.

On page 16 of the brief of the petitioner, it is said:

> "If a State is a 'person' within the meaning of an Act of Congress regulating an activity in which a State engages, it is also a 'person' for the purpose of availing itself of the remedies provided by an Act of Congress for the injuries which it has sustained."

But the condition of this sentence that a State is a "person" within the regulatory provisions of the Anti-Trust Acts is carefully never conceded.

The position is maintained that the word "person" has two meanings in the Act. This is hardly credible, for there is nothing in the language of the Act that indicates the use of the word in but one sense. By the language of the Act the word "person" or "persons" is given one meaning *"wherever used"* (USCA Title 15 §12) in the sections of the Act here under consideration.

As this Court said in *U. S. vs. Cooper Corp., 312 U. S. 600*: "The ordinary dignities of speech would have led" to the mention of the name of the United States, if it had been intended to include the United States as a person. This is even more true as to a State. One sovereign does not legislate for another sovereign. Certainly, the statutes of one sovereign will not be construed to include and regulate the

acts of another sovereign, without express mention of that other sovereign. This seems particularly to be true of the Anti-Trust Acts. They give to any person injured by the acts of any other person a right to recover treble damages. The person causing the injury may be sued for treble damages only in the Federal Courts. Yet the Constitution specifically denies jurisdiction in the Federal Courts of any suit of any kind against a State. Congress could not have intended to include a State in the term "person" of the Anti-Trust Acts.

It is not sufficient to say that whether a State may be liable for treble damages will be decided when that question is presented. The sole question here is whether the State is a "person" and that word is used in only one sense in the Act. Any "person" can be sued for treble damages. A State cannot be sued by the very exclusion of the Act restricting actions for treble damages to the Federal Courts. Nor may the question be properly evaded by assuming that it will never arise and ignoring it. The private activities of States are increasing. The State of Florida was recently sued in the State Courts of Georgia. *Florida State Hospital for Insane vs. Durham Iron Co., 17 S. E. (2d) 842.* And in *Lowenstein vs. Evans, 69 Fed. 908,* long ago the Court considered whether the State of South Carolina was a "person" that under the Act was subject to regulation and treble damages for a monopolistic practice.

The brief for the petitioner takes the position that unless the State of Georgia is permitted to sue for treble damages under the Anti-Trust Acts, it will be left without remedy, and argues that the State of Georgia therefore must be held to be a "person" under those Acts. This position is not sound.

The State of Georgia is a sovereign, with power to legislate, and may legislate to protect itself against monop-

olistic practices, even though those practices involve interstate commerce. *Louisville & Nashville Railroad Co. vs. Commonwealth of Kentucky, 161 U. S. 677; Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86.*

The question presented to the Court is one that was settled by this Court when it decided in *U. S. vs. Cooper Corp., 312 U. S. 600,* that a "person" under the provisions of the Anti-Trust Acts included only natural and artificial persons, that is, individuals and corporations, and that the United States was not a "person" entitled to sue for treble damages under the Act. This case seemed to be so completely covered by *U. S. vs. Cooper Corporation* that the Circuit Court of Appeals of the Fifth Circuit affirmed the decision of the District Court dismissing the action with only a per curiam decision. The denial of the writ of certiorari in the present case will be taken to settle the question definitely. There is no conflict in decision.

Just a few days after the petition for certiorari was filed in this case counsel for the respondent were served with a printed brief amici curiae in behalf of 34 States other than Georgia, which, however, bears upon the cover the words "Williams Ptg. Co., Atlanta.".

The amici curiae speak of their "apprehension" lest the judgment of the Circuit Court of Appeals "will greatly limit and restrict the remedies available to a State." It is not suggested that any of these States have any suits now pending in which they seek to proceed under the Anti-Trust Acts, nor is it suggested that any of them contemplate filing any such suits.

These statutes have been in force for many years, and there is no record of any State ever attempting to bring a suit under this provision before the present case. The "apprehension," therefore, of the amici curiae is a little diffi-

cult to understand since, heretofore at least, all States have found their own laws ample to protect their interest. Also, the fact that this printed brief appeared so promptly, and was printed in Georgia, indicates a response to an organized effort to have permision to use the names of the States filing the brief rather than any real or spontaneous apprehension or interest existing in those States. The Attorneys General of the several States would naturally accommodate the Attorney General of a sister State where they could do so with propriety, and with no risk to the States for which they acted.

Respectfully submitted,

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BRIEF FOR RESPONDENTS

The counsel filing this brief represent the respective respondents indicated by their signatures, and each of course speaks for his own client only. It was believed, however, that it would be a convenience to this Court for the contentions made by the counsel for the respective respondents to be combined in one brief.

REFERENCE TO REPORT OF OPINIONS IN THE COURTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed in 123 Fed. 2nd, 57. (Advance sheet No. 1, December 8th, 1941.)

THE QUESTION HERE IS ONE OF STATUTORY CONSTRUCTION ONLY

Do the Federal Anti-Trust Acts grant to a state the right to recover treble damages? Is a state embraced within the term "person" to whom such cause of action is granted? We are not here dealing with the question of whether a state may be a person under some other statute, or how far the term "person" may under other circumstances and in other uses include a state. The question is narrower than this: It is whether the term as used in the Anti-Trust Acts includes a state.

Rules of statutory construction are no more than aids in arriving at a solution of such a question. The answer must be found primarily within the four corners of the statute itself, and from a consideration of every relevant feature in the statute.

This Court has in a number of late cases pointed out one landmark which every court should bear in mind in approaching the construction of a statute. This has been done by the repeated warning given recently by this Court against straining the use of considerations of policy

beyond their legitimate function in the construction of a statute. Considerations of policy can to some extent be an aid, but as this Court has warned, there is always danger that the misuse of such considerations will result in substituting the judge's own views on economic and social problems in place of the enactment itself. The briefs of petitioner and of the amici curiae dwell so largely on considerations of what they assert to be public benefit that a brief reference to the warning so given by this Court is here in order.

In *United States vs. American Trucking Associations, Inc., 310 U. S. 534, at 544,* the Court says:

> "Obviously there is danger that the court's conclusion as to legislative purpose will be unconsciously influenced by the judge's own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat. . . ."

In *McGlain vs. Commissioner of Internal Revenue, 311 U. S. 527, at 530,* the Court says:

> "The answer is that we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation."

In *United States vs. Cooper Corporation, 312 U. S. 600, at 605* (a case to be referred to more fully later), the Court says:

"It is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

And as late as March 2, 1942, in *Cudahy Packing Co. of La. Ltd. vs. Holland, 62 S. Ct. 651, 656,* this Court says:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, *that it is any part of the judicial function to restore to the Act what Congress has taken out of it.* Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and *that this precludes our restoring it by construction.*" (Italics ours)

UNITED STATES VS. COOPER CORPORATION, 312 U. S. 600, IS SOUND AND NECESSARILY CONTROLS.

The statute giving the right to recover treble damages under which this suit is brought is *§ 7 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209,* as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be un-

lawful by this Act, may sue therefor, in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

In the *Cooper Corporation case* above referred to, the Court held that the term "person" as used in this statute to whom a cause of action for treble damages is given, was limited to "natural and artificial persons, that is, individuals and corporations." It was specifically held that it did not include the United States because it was a sovereign government. Both the District Court and the Circuit Court of Appeals treated it as perfectly obvious that such construction likewise excluded a state government. There are additional reasons for excluding a state government. We merely note here that the effort of the petitioner to distinguish the ruling in the *Cooper Corporation case* from the case at bar is wholly without merit.

The distinction attempted is set out in the opposing brief, commencing at page 37. Counsel assert three propositions which will be considered separately:

1. It is asserted that the State, by entering into the Federal Union under the Federal Constitution, surrendered its sovereignty so far as interstate commerce is concerned, and hence is not a sovereign "with reference to the United States Anti-Trust Acts because they apply only to interstate commerce."

The answer to this, of course, is quite simple. The State did surrender its sovereign power to regulate interstate commerce, but it surrendered nothing else in this respect.

2. Counsel then assert that because of a certain Georgia statute the State has voluntarily assumed the status of an individual. That Georgia statute is *§ 91-405 of the Georgia Code.* Petitioner's brief p. 46.

As we understand this proposition, counsel contend that a state merely by authorizing a suit to be brought surrenders all its sovereign rights. No case is cited for any such conclusion. This statute merely authorizes the Attorney General to institute suits to recover debts and property belonging to the State. It has never been held that a state by merely instituting actions in its name abandoned its sovereign capacity.

Counsel's point here appears to be wholly illogical. It seems to be a contention that this State statute has the effect of conferring on the State a right under the Federal statute which it would not otherwise have possessed. No state legislation could accomplish this. The State is either granted the right to sue by the Federal statute or it is not. No act on its part can enlarge the grant or supply its absence.

3. Counsels' third point is that by purchasing paving materials in interstate commerce the State of Georgia "divested itself of its sovereignty" and assumed "the status of an individual person by its own action." The con-

clusion that counsel draw from this is stated in their syllabus as follows: "When a state has divested itself of sovereignty it must bear the burdens imposed on individuals and is entitled to their remedies."

The first observation about this is that it would in no way distinguish this case from the Cooper Corporation case, because the United States in that case was purchasing materials, and the State is in law as much a sovereign as the United States, and since the mere purchase of materials did not divest the United States of its sovereignty, it could not have that effect with respect to a state.

The second observation is that the State was buying these materials to pave roads, and the construction of public roads is a high governmental function, not a commercial venture in any sense.

And the third is that counsels' position goes much too far. They do not state what burdens the State would assume as a result of thus (as they say) divesting itself of sovereignty, but it is well enough to mention some of the consequences that would follow if their position were ever accepted. Some of the consequences are these: The State could be sued under the Sherman Act in those instances where it has created a monopoly in interstate commerce; it could be sued without its consent in the Federal Courts; the Eleventh Amendment of the Federal Constitution would no longer apply; and the State would be liable for torts and could be sued therefor.

That all of this is not fanciful will be shown later in the brief when we point out that an attempt was once

made to sue the State of South Carolina under the Federal Anti-Trust Acts.

We are confident that this Court will not accept a doctrine having such far-reaching consequences. Arguments about "sovereignty" and "divesting sovereignty" are highly metaphysical. When they lead to such revolutionary results they answer themselves.

It is thus apparent that the Cooper Corporation case can in no way be distinguished from the case at bar. The same rule must inevitably apply to a state government. Indeed, there are additional reasons why the case for excluding a state government is even stronger.

THE STATUTES SHOW THAT A STATE HAS NOT THE RIGHT TO RECOVER TREBLE DAMAGES

The question is whether a state is a "person" to whom a right of action for treble damages is given by Section 7.

The Anti-Trust Acts created new rights and remedies which are available only to those upon whom they are conferred by the Acts.

United States vs. Cooper Corporation,
312 U. S. 600.

D. R. Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165, 174.

Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27, 29.

Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590, 593

The rights conferred by the Anti-Trust Acts have their sole origin in the statutes and are possessed only by those to whom the statutes grant the rights.

1. Normal Meaning of "Person."

The right to recover treble damages under Section 7 of the Sherman Act is granted to "any person who shall be injured in his business or property." In common usage the word "person" does not include a sovereign, and it was admitted by the Government in the Cooper Corporation case that this was true. If the purpose was to include the enacting sovereign "the ordinary dignities of speech would have led" to its mention by name.

Davis vs. Pringle, 268 U. S. 315, 318.

United States vs. Cooper Corporation, 312 U. S. 600.

This rule is even more true as to another sovereign, such as one of the States. Certainly the statutes of one sovereign would not be construed to include another sovereign without express mention of that other. An examination of the cases where a sovereign has been held to be included within the statute without being named will show that they go only to the point of including the sovereign which itself enacted the statute. It would be

extraordinary for one sovereign to enact a regulatory statute that would attempt to embrace another sovereign even though mentioned specifically. Certainly, another sovereign would never be included by implication.

2. USE OF THE WORD "PERSON" IN THE ANTI-TRUST ACTS

Section 7 of the Sherman Act provides that any "person" who shall be injured by "any other person or corporation by anything declared to be unlawful under the Act, shall have the right to recover treble damages." Plainly the word "person" is used in only one sense. There is nothing to indicate different meanings for the two uses of the word in the same sentence. The word "other" directly connects the word "person" the second time it is used with the same word as it first appears in the sentence, thus giving the word the same significance in both places in the sentence. In the first instance the word "person" indicates the one to whom the right is given. In the other instance it indicates the one of whom damages may be recovered. The word "other" links the second use of the word "person" back to the first use and indicates that it has the same significance.

The word "person" is used in other sections of the Anti-Trust Acts.

In Section 1 it is provided that "every person who shall make any contract or engage in any combination or conspiracy *** shall be deemed guilty of a misdemeanor ***" and be punished therefor.

In Section 2 it is provided that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce*** shall be deemed guilty of a misdemeanor***" and be punished therefor.

In Section 3 of the Act it is provided that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor ***" and be punished therefor.

A "person" in the sense of the Acts is made subject to criminal prosecution. Criminal prosecution of a State by another sovereign could not have been intended yet the word "person" is used uniformly throughout the Act.

In Section 8 of the Act it is provided that wherever the word "person" is used that the word "shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any territories, the laws of any State, or the laws of any foreign country." The section was evidently inserted to make certain that there should be included every entity that was intended to be subject to the Act. Corporations and associations existing under the laws of the United States or of a state were included. If it had been intended to include the States themselves in the all inclusive provision of Section 8 it would have been expected that they would be specifically named. Corporations existing under the laws of the States are included but the States that created those corporations are not included.

The State as a corporation was expressly excluded when the corporations to be included as "persons" were restricted to corporations created by the United States or any of the States. If a state is a person, Section 8 is surplusage. Any such construction must be avoided.

The whole matter becomes clearer if we take the language of Section 8 of the Act and write it directly into Section 7 of the Act. This is entirely permissible because the purpose for which Section 8 was inserted is thus carried out. Combining the two sections in this way the following results:

> "Any person, *including corporations or associations, existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,* who shall be injured in his business or property by any other person or corporation, *including corporations or associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country,* by reason of anything forbidden or declared unlawful by this act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, with respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics indicate provisions taken from Section 8.)

No one reading the statute so stated could have the slightest doubt that the word "person" wherever used in the statute meant a natural person or an ordinary private corporation.

It is significant that Section 8 is inserted at the end of the Act. It refers back to the whole of the Act and all of its provisions. Its language itself declares that its statement of the word "person" applies "wherever used in this Act." Only one meaning of the word "person" is permitted.

It is significant too that when the Clayton Act was passed in 1914 the language of Section 8 was copied into the Clayton Act. "Person" was said to mean the same thing in the Clayton Act that it means in the Sherman Act. Between the passage of the Sherman Act in 1890 and the passage of the Clayton Act in 1914 there had been a number of decisions by Federal Courts stating that the word "person" meant only a private party. We shall refer hereafter specifically to those decisions.

The word "person" is used in the Acts in only one sense, yet the Acts subject persons to criminal prosecution and to liability for treble damages. No prosecution or suit for treble damages against the United States or any State could have been intended. Such prosecution and suit would clearly have been authorized unless the word "person" is used in two radically different senses, which Congress expressly prohibited by saying that the word had the same meaning "wherever used in this Act."

3. The Plan of the Sherman Act.

The scheme and plan of the Act seems to have been clearly envisaged by the draftsman.

Sections 1, 2, and 3 provide for criminal prosecution for violations of the provisions of the Act. Section 4 gives a right of injunction to restrain violations of the Act at the suit of the United States alone, and Section 5 refers to the service in those suits. Section 6 authorizes the seizure by the Government of goods transported in violation of the Act.

All the provisions of Sections 1 through 6 deal with remedies afforded to the United States, then Section 7 takes up a different subject and creates the right of a person to recover treble damages for injuries to his business or property by any other person by reason of anything forbidden in the Act. This plan of the Act shows a clear definition of rights conferred upon the United States and rights conferred upon "persons." The United States was included in the first six paragraphs but in the seventh paragraph the right to recover was given only to "persons" referred to in Section 7. The right was given only to natural and artificial persons; that is, individuals and corporations, even though the language of the section is plainly an expansion of the everyday meaning of the word "person."

4. Legislative History of the Anti-Trust Acts.

The legislative history of the Sherman and Clayton Acts is useful in the construction of the meaning of the word "person."

When the Sherman Act was under discussion, it was pointed out that Section 1 authorized the United States to bring civil actions including those for simple damages; and that under Section 2, private parties could recover double damages. Senator Sherman stated that the right to recover double damages was only in private parties, and not in the United States. He stated that the civil suit by the United States authorized by Section 1 might be for an ouster of the power of the corporation for damages or in quo warranto, and said:

> "But the second section provides purely a personal remedy, a civil suit also by citizens of the United States."

Senator Hoar re-wrote most of the bill, and eliminated Section 1 with its provision for civil suits by the United States, and substituted Sections 1, 2, 3, 4 and 6, defining the remedies, civil and criminal, and by way of forfeiture, available to the United States. He retained, with slight change, Section 2 of the bill increasing the damages recoverable to treble damages. In this form, the bill was adopted.

When the Clayton Act was under consideration by Congress, Senator Reed, a member of the Judiciary Committee, offered an amendment to the bill, reading:

> "That the Attorney General of any State may, at the cost of the State, bring suit in the name of the United States to enforce any of the Anti-Trust laws."

When we keep in mind the fact that the language of the Clayton Act, particularly in its reference to the word "person" in Section 1, is identical with the language of the Sherman Act, it seems clear that Congress recognized that a State would not be included in the remedies unless specifically named.

The amendment offered by Senator Reed was rejected.

In 1939, Senator O'Mahoney introduced a bill (S-2719) drafted to permit the United States to bring a suit for treble damages under the provisions of the Anti-Trust Act. This bill has now remained pending for more than a year since the decision in the Cooper Corporation case.

Evidently Senator O'Mahoney introduced his Bill back in 1939 in recognition of the line of cases, some decided prior to the passage of the Clayton Act and some since the passage of the Clayton Act, holding that the right to suit for treble damages was only in private parties, and Congress, since the Cooper Corporation case, has recognized the correctness of that construction in permitting the Bill to remain pending for more than a year.

5. JUDICIAL EXPRESSION OF THE MEANING OF "PERSON."

There is a considerable body of judicial expression extending over a long period of years that only private persons and corporations may sue for treble damages.

In *Lowenstein vs. Evans, 69 Fed. 908*, the Court said:

"The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and had conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case, as the monopoly now complained of is that of the State, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights. In this proceeding and under the act of 1890, he must seek his remedy against the holder of the monopoly; and, as in the present case the monopoly is in the State, the court has no jurisdiction. The demurrer is sustained, and the complaint is dismissed."

The Court said in *Pidcock vs. Harrington, 64 Fed. 821 (C.C.,S.D.N.Y.)*:

"***a private person is given (section 7) the right to maintain an action at law;***The first three sections are penal statutes. They give no civil rem-

edy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribed the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy.*** The only section which gives a private remedy is the seventh***" (p. 822).

In *Greer, Mills & Co. vs. Stoller, 77 Fed. 1 (C.C.W. D.,Mo.)* the Court said:

"Section 7 gives to the private person 'injured in his business or property by any other person or corporation by reason of anything forbidden, or declared to be unlawful by this act,' a right to sue in a circuit court of the United States in the district in which the defendant resides or is found for threefold damages by him sustained. The statute, being highly penal in its character, must be strictly construed; and, having created a new offense, and imposed new liabilities, and having provided the modes of redress to the public and the private citizen, by established rules of construction, these remedies are exclusive of all others." (p. 3)

United States vs. Patterson, 201 Fed. 697 (S. D., Ohio), rev'd on other grounds *222 Fed. 599 (C.C.A. 6th)*, *cert. den. 238 U. S. 635*:

"The act does not primarily grant any right to be enforced in a civil action. It creates an offense, a

crime, describing what the crime is. To do the acts prescribed in the first and second sections is declared to be unlawful; that is to say, criminal. Hence the right given by Section 7 to an individual to recover for injury to his business or property with threefold damages, and the right given by section 4 to the government to prevent by injunction a continuance of the acts complained of, are rights growing out of the commission of a crime, by whomsoever it may be, whose acts also subject him to the criminal penalties of the statute. If he has been guilty of a crime described in sections 1 and 2, then he may be restrained by the government in a civil action, or be compelled by an individual who has been injured in his business or property to respond in threefold damages" (p. 714).

No change in the views of the lower courts has occurred.

Quemos Theatre Co., Inc. vs. Warner Bros. Pictures, Inc., 35 F. Supp. 949 (D.C.N.J.):

"***Section 7, the threefold damage clause of the Sherman Act was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement" (p. 950).

Glenn Coal Co. vs. Dickinson Fuel Co., 72 Fed. (2d) 885 (C.C.A. 4th):

"***It is well known that the main purpose of the Anti-Trust Act was to protect the public from

monopolies and restraint of trade and the individual right of action was but incidental and subordinate" (p. 889).

This Court has reaffirmed this position of the lower courts.

Standard Sanitary Manufacturing Co. vs. United States, 226 U. S. 20:

"The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively.*** Besides a suit by the Government there may be an action for damages by a 'person injured by reason of anything forbidden by the Act' " (p. 52).

General Investment Co. vs. Lake Shore & Michigan So. Ry. Co., 260 U.S. 261:

"As respects the Sherman Anti-Trust Act as it stood before it was supplemented by the Clayton Act, this Court has heretofore determined that the civil remedies specially provided in the act for actual and threatened violations of its provisions were intended to be exclusive and that those remedies consisted only of

(a) suits for injunctions brought by the United States in the public interest under Section 4 and

(b) private actions to recover damages brought under Section 7" (p. 286).

6. Administrative Interpretation of the Word "Person."

The administrative practice since the passage of the Sherman Act indicates that it has been the view of the United States and of the forty-eight States that there was no right of action in the United States or in any of the forty-eight States for treble damages for in the period of more than fifty years no such actions appear to have been filed except the Cooper Corporation case and the present case.

Administrative practice is entitled to substantial weight in the construction of statutes, particularly where it has lasted over the long period of fifty years. There is a long line of decisions by this Court so holding:

Trade Commission vs. Bunte Bros., (7th C.C.A., 1941) 312 U. S. 349, 352:

> "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 315."

In *Norwegian Nitrogen Co. vs. United States (1933), 288 U. S. 294, at 315,* the Court says:

"True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. United States v. Moore, 95 U. S. 760, 763; Logan v. Davis, 233 U. S. 613, 627; Brewster v. Gage, 280 U. S. 327, 336; Fawcus Machine Co. v. United States, 282 U. S. 375; Interstate Commerce Co. v. N. Y. N. H. & H. R. Co., 287 U. S. 178."

In *United States vs. Moore, (1887), 95 U. S. 760, at 763*, the Court says:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat. 210; United States v. The State Bank of North Carolina, 6 Pet. 29; United States v. MacDaniel, 7 *id.* 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *Logan vs. Davis (1914), 233 U. S. 613, at 627*, the Court says:

"The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed

except for very cogent reasons. United States v. Moore, 95 U. S. 760, 763; Hastings and Dakota Railroad Co. v. Whitney, 132 U. S. 357, 366; United States v. Alabama Great Southern Railroad Co., 142 U. S. 615, 621; Kindred v. Union Pacific Railroad Co., 225 U. S. 582, 596."

In *Brewster vs. Gage (1930) 280 U. S. 327, at 336*, this Court says:

"It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. Logan v. Davis, 233 U. S. 613, 627. Maryland Casualty Co. v. United States, 251 U. S. 342, 349. Swendig v. Washington Water Power Co., 265 U. S. 322, 331."

In *Wisconsin vs. Illinois (1929), 278 U. S. 367, at 413*, this Court says:

"This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. United States v. Minnesota, 270 U. S. 181, 205; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Kern River Co. v. United States, 257 U. S. 147, 154; United States v. Burlington & Missouri River R. R., 98 U. S. 334, 341; United States v. Hammers, 221 U. S. 220, 228; Logan v. Davis, 233 U. S. 613, 627."

In *United States vs. Minnesota* (*1926*) *270 U. S. 181, at 205*, the Court says:

> "The Act of 1860 was construed as we here construe it by Secretary Delano in 1874, 1 Copp's P.L.L. 475m and by Secretary Schurz in 1877, 2 *id.* 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

7. ADDITIONAL REASONS WHY A STATE IS NOT A "PERSON."

All of these reasons were given by this Court in the Cooper Corporation case as reasons for holding that the United States was not a person who could recover treble damages. Every reason for holding that the United States is not a person under the Anti-Trust Acts is an equally strong reason for holding that one of the States is not such a person with the right to recover treble damages, and there are additional reasons why a state cannot be a person with the right to recover treble damages.

By the express provisions of Section 7 of the Act, a "person" may sue for treble damages only in the District Court. This is an express condition upon the right

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*3 L.D. 474, 476; 22 *id.* 388; 27 *id.* 418; 32 *id.* 65, 328; 37 *id.* 397.

created by the Act. No other court has jurisdiction. We must assume that Congress was familiar with the fact that under Article Three, Section 2, Paragraph 2 of the Constitution of the United States the Supreme Court of the United States is given original jurisdiction of suits brought by a state. Hence, had Congress intended to create a right for a state to recover treble damages under Section 7 of the Sherman Act, it seems very unlikely that Congress would at the same time have so conditioned the right as to deprive a state of its right under the Federal Constitution to bring an original suit in the Supreme Court of the United States.

The Eleventh Amendment of the Constitution of the United States prohibits a suit in the District Court against any state. If a state is a "person" under the terms of the Act it may be made a defendant as well as be a plaintiff. Yet jurisdiction of suits under the Anti-Trust Acts is confined to a court in which the Eleventh Amendment expressly prohibits the bringing of a suit against a state.

8. Reply to the Petitioner's Objections to This Reasoning.

To this reasoning the State of Georgia makes certain replies which we believe we can show are unsound.

a. The Anti-Trust Acts are not merely remedial as the State assumes but are acts that create new rights.

The State claims that the statute is remedial and as a remedial statute should be liberally construed. It is said

that Section 7 is not penal but is a remedial provision. This contrast between a penal provision and remedial provision ignores the real point that the Anti-Trust Acts create new rights. These Acts are not merely remedial, affording a remedy for a pre-existing right. The source of the right is the new Act itself. Though the Anti-Trust Acts are not penal in the technical sense of the word it has been held that the provisions for treble damages is punitive and must be construed just as written.

Fleitmann vs. Welsbach Street Lighting Co., 240 U. S. 27, 29.

American Banana Co. vs. United Fruit Co., 153 Fed. 943, 944.

Decorative Stone Co. vs. Building Trades Council of Westchester County, 23 Fed. (2d) 426. Certiorari denied, 277 U. S. 594.

Greer Mills & Co. vs. Stoller, 77 Fed. 1, 3.

Johnson vs. Jos. Schlitz Brewing Co., 73 Fed. (2d) 176, 182.

D. R. Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165, 173-175.

Hansen Packing Co. vs. Armour & Co., 16 F. Supp. 784, 787.

La Chappelle vs. United Shoe Machinery Co., 13 Fed. Supp. 939.

The State then takes the position that the reasoning in the Cooper Corporation case was falacious, and cites

certain cases that it is claimed hold remedial statutes include the sovereign, although not named. The statutes involved in these cases were entirely different from the Anti-Trust Acts. They were not statutes creating rights and then affording remedies to enforce those rights but were statutes which offered general remedies for rights that existed independently of the statute.

We shall refer to cases cited by the petitioner.

United States vs. Fox, 94 U. S. 315, involved a statute which governed the descent of land in the State of New York and the question was whether the United States was a person that under that statute could acquire title to land by devise. This is the only case of those discussed by petitioner which did involve a statute which created rights and it was held that the statute did not create any right to the United States as a person to receive title to land by devise.

In *Stanley vs. Schwalby, 147 U. S. 508,* Stanley and others as servants of the United States in possession of land for the United States were made defendants in an action of trespass to try title. They pleaded the statute of limitations and the Court held that "if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defense was made out. Agents when treated as principals may rely upon the protection of the statute." As the defendants were in possession of the land it is plain that they had rights based on that possession and were merely taking advantage of a

statute which afforded the negative relief of a limitation upon actions.

In *Pierce vs. United States, 255 U. S. 398*, the United States had title to a judgment for a penalty in the sum of $14,000.00. This pre-existing right the United States sought to enforce by the remedy of a creditors bill, and it was held a proper procedure.

In the *Queen and Buckberd's case, 1 Leon. 149; 74 Eng. Reprints 138*, the Queen sought damages for the value of a church to which she had the right to present. Her right to the property existed independently of the statute. It was held that she had the right to avail herself of the remedy of the statute.

In *Lord Berkley's case, 1561 Plow. 223, 243; 75 Eng. Reprints 339, 372*, the actual holding was that the King, although he is not mentioned by name in the Statute de Donis Conditionalibus, is bound by that Statute. The quotation made by counsel for the petitioner expresses the views of Weston, J., which did not prevail.

In *The Case of a Fine, 7 Coke 32 a; 77 Eng. Reprints 459*, the King had title to an estate tail. It was held that he could avail himself of the remedy to bar the estate tail.

In the *Queen vs. Cruise case, 2 Ir. Ch. Rep. 65*, the quotation of counsel for petitioner is obiter. In that case there was a petition for a Receiver founded on a judgment. The sole question was as to whether the statute in question barred, for a year after the judgment was en-

tered, the petition for a Receiver. The decision only went to the point that the bar of one year did not apply because under the provisions of the statute it was sufficient if a year had elapsed since the enrollment of the recognizance on which the judgment had been issued. The statute was purely remedial. It was said in the opinion that where the Queen took advantage of a remedial statute she was bound by the conditions imposed by the statute.

In *Tindal vs. Wesley, 167 U. S. 204*, it is said that the United States may "avail itself of all the remedies which the law allows to other persons, natural or artificial, for the vindication and assertion of its rights." The rights that were being considered by the Court arose out of the fraud of the defendant and not in any statute.

In *United States vs. Jacinto Tin Co., 125 U. S. 273*, the United States had been deprived of land by fraud. Its rights arose because of the fraud, wholly independently of any statute. The decision was that it could recover the land.

In *Wilder Mfg. Co. vs. Corn Products Refining Co., 236 U. S. 165*, cited by the State, this Court laid down the very rule for which we are here contending, that Anti-Trust Acts are the source of rights and that those Acts must be looked to to see to whom the rights are granted.

The cases which we have referred to above, upon which the petitioner relies, are not in point here. Those cases never approach the question here presented of the construction of a statute which is the source of newly created rights for which the statute also gives remedies.

The only one of those cases which deals with rights is *United States vs. Fox*, and there it was held that the United States was not a person who was a grantee of the rights.

b. The authorities cited by the State do not support the State's proposition that *United States vs. Fox* is against the weight of authority.

In *State Highway & Public Works Commissioner vs. Cobb, 2 S. E. (2d) 565, 215 N. C. 556*, while recognizing the availability of common remedies to a state the judgment of the Court went only to the point that the State of North Carolina had no rights under any statute or at common law to recover money that had been voluntarily expended in recapturing an escaped prisoner. There being no right existing or created by statute the Court denied recovery, notwithstanding available remedies.

In State vs. Dunniway, 128 Pac. 853, 63 Ore. 555, the State sought to recover possession of certain premises in the State House in which it obviously had the right of property. It was held that among other remedies available to the State to protect its essential and pre-existing rights an ordinary action of ejectment would lie therefor.

Vestal vs. Pickering, 267 Pac. 821, 125 Ore. 553, is a case where it was held that the State of Oregon could take as a beneficiary under a will. The right to pass the title to property by will is a statutory right. It comes from the State itself. In the absence of such grant of statutory right to the owner of property the title to property within the State would pass to the State upon death of the

owner. It was not necessary for the State to find its right to take the property in the Act. This case is in contrast to *United States vs. Fox*. Whereas control of title to property in a State is wholly within that State and can be regulated only by it such is not true of the United States. In the Fox case since there was no pre-existing right in the United States to control the passing of title on death of the owner it was necessary to find the grant of the right to take in the Act.

In re *Edges Estate, 14 Atl. (2d) 293, 339 Pa. 67*, and *Lenjert vs. Feldman, 202 Pac. 624, 110 Kan. 115*, are likewise distinguished.

Kansas vs. Herold, 9 Kan. 194, is a case where the United States was vested with title to property and Herold was simply prosecuted for trespass thereon.

In *State of Indiana vs. Woram, 6 Hill 33, 40 Am. Dec. 378*, the statute under consideration provided that the word "person" would extend to every corporation capable by law of making contracts. Obviously, a state can make a contract.

In *State vs. Odd Fellows Hall Assn., 243 N. W. 616, 123 Neb. 440*, the statute under consideration defines the word "person" to include any "other entity that may be the owner of property." Clearly this includes a state.

State vs. General American Life Ins. Co., 272 N. W. 555, 132 Neb. 520, involved a declaratory judgment statute. A declaratory judgment statute does not create rights but simply establishes a remedial procedure for adjudica-

tion prior to a breach of the contract or other default. It does nothing except accelerate a remedy and permits the parties to get an adjudication as to the rights already owned by them before default or breach. The statute here involved expressly declared that "This Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.***"

The other cases cited on page 30 seem to be irrelevant and require no comment.

c. The Acts Do Not Deprive the States of Any Remedy.

The State of Georgia is not without a remedy, as contended by the petitioner. It, at all times, has had the right to sue for damages suffered because of any wrongful conspiracy. *Brown & Allen vs. Jacobs Pharmacy Co., 115 Ga. 429.*

Further, the State Constitution provides in Par. IV, Section II, Article IV, that all contracts and agreements "which may have the effect, or be intended to have the effect to defeat or lessen competition, or to encourage monopoly" shall be illegal and void. If it was the intended public policy of the State of Georgia that the State should have a civil action for treble damages for violation of this provision of the Constitution, which is similar in its scope to the Anti-Trust Acts, such a provision could easily have been incorporated into the Constitutional provision or added by an enabling statute of the Legislature.

There is nothing in the Federal Constitution which prohibits any such legislation by the State even though interstate commerce may be involved. *L. & N. Ry Co. vs. Commonwealth of Ky., 161 U. S. 677; Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86.*

In neither the Constitution of the United States nor the Anti-Trust Acts is there any divesting whatsoever of any rights of the State of Georgia. The Anti-Trust Acts created new rights, granted them to the persons described in the statutes and intentionally omitted States as grantees of such right.

CONCLUSION

The single question of law here involved is a narrow one. Did Congress intend to extend the term "person" to include a state, in creating rights and punitive remedies in the Sherman and Clayton Acts? The objective is the intent of Congress, and not what Congress could, or should, have done.

The Cooper Corporation case has recognized that Congress intentionally omitted the creation of a right to recover treble damages in the United States, and there are many compelling reasons for the conclusion that Congress intentionally omitted the creation of such rights in states.

The term "person" wherever used in the Acts has but a single meaning under its express provisions. If, as contended, the term includes a state, the State by the

plain language of the Acts, would be subjected to stringent regulation by the United States, to criminal prosecution and fine, to a suit for injunction or civil action for treble damages in the District Court of the United States, contrary to the provisions of the Constitution of the United States, and the State would be deprived of its rights to sue in the Supreme Court of the United States. In return for all of this the State would receive only the right to recover threefold damages, instead of the right it now has at common law, to recover simple compensatory damages. Certainly Congress should have employed "the ordinary dignities of speech" by specifically naming the States to accomplish such far-reaching results.

The State is on a par with the United States as a sovereign, and requires equal dignity of expression in acts conferring rights and remedies upon it. The State, as a sovereign, has the power to create adequate rights and remedies for its own protection and, at common law, the State has a right to sue for and recover simple damages. It does not need, and should not have, punitive treble damages.

A state by its own acts cannot enlarge an act of Congress. The waiver of a state's sovereignty rests with its Legislature. A contention in a suit by a state, made by its Attorney General and executive officers that the State has waived its sovereignty, should not be accepted without close scrutiny of the authority so to do.

Every applicable rule of statutory construction points to the conclusion that a state has no right to recover treble damages under the Federal Anti-Trust Acts. No

state has asserted such a right for over fifty years until the institution of this case. The Courts have, in numerous decisions, recognized the right to recover treble damages as belonging only to private individuals. The language of the Acts does not permit the extension of the term "person" to include a state. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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